BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD

EASTERN WASHINGTON REGION

STATE OF WASHINGTON

JOSHUA CORNING AND BUILDING NORTH CENTRAL WASHINGTON, Petitioners, v. DOUGLAS COUNTY, Respondent.	Case No. 13-1-0001 **FINAL DECISION AND ORDER**

SYNOPSIS

On December 18, 2013, the Board of Douglas County Commissioners adopted Ordinance No. TLS 12-16-49 (The Ordinance), which restricts the number of limited land segregations allowed by the County in designated agricultural lands. On February 25, 2013, Petitioners Joshua Corning and Building North Central Washington, PC, filed a Petition for review challenging The Ordinance, alleging that the County failed to notify the Department of Commerce in a timely manner of its intent to adopt The Ordinance, a failure to act by a statutory deadline. The Petitioners also alleged that the County's adoption of The Ordinance, violated GMA goals and requirements to conserve and protect agricultural and rural lands but did not brief the Board in the Hearing on the Merits on this issue, thereby abandoning it. Based on the above issues, the Petitioners requested the Board to enter orders of non-compliance and invalidity.

With its Statement of Actions, Douglas County has reported to the Board the actions it has taken to properly comply with RCW 36.70A.106.[1] Although the Petitioners argue that a late notice to Commerce is an egregious violation of the GMA, not just a procedural

[1] Statement of Actions by Douglas County, dated July 15, 2013.

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action, the Board finds that the County has taken the actions required by the Act regarding notice to the Department of Commerce and complied with its statutory requirements.

I. PROCEDURAL BACKGROUND

The Petition for Review was filed on February 25, 2013. The Prehearing Order was issued on April 3, 2013. The Petitioners filed a Motion for Summary judgment on issue 1, the non-filing of a proper notice with the Department of Commerce on April 22, 2013, asking the Board to enter an order of non-compliance and invalidity for The Ordinance. On May 13, 2013, the Board deferred consideration of Petitioner's Motion for Summary Judgment to the Hearing on the Merits. The Hearing on the Merits was held on July 16, 2013, in East Wenatchee, Washington, with the Eastern Washington Regional Panel comprised of Presiding Officer Charles Mosher and Board Members Raymond L. Paolella and Cheryl Pflug. Attending the Hearing were Attorney Samuel A. Rodabough, representing the Petitioners Joshua Corning and Building North Central Washington, and Steven M. Clem, Douglas County Prosecuting Attorney.

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, AND STANDARD OF REVIEW

Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations, and amendments to them, are presumed valid upon adoption.[2] This presumption creates a high threshold for challengers as the burden is on the petitioners to demonstrate that any action taken by the County is not in compliance with the GMA.[3]

The Board is charged with adjudicating GMA compliance and, when necessary, invalidating noncompliant plans and development regulations.[4] The scope of the Board's review is limited to determining whether a County has achieved compliance with the GMA

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[2] RCW 36.70A.320(1) provides: [Except for the shoreline element of a comprehensive plan and applicable development regulations] "comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption."

[3] RCW 36.70A.320(2) provides: [Except when city or county is subject to a Determination of Invalidity] "the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter."

[4] RCW 36.70A.280, RCW 36.70A.302.

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only with respect to those issues presented in a timely petition for review.[5] The GMA directs that the Board, after full consideration of the petition, shall determine whether there is compliance with the requirements of the GMA.[6] The Board shall find compliance unless it determines that the County's action is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA.[7] In order to find the County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been committed."[8]

In reviewing the planning decisions of cities and counties, the Board is instructed to recognize "the broad range of discretion that may be exercised by counties and cities" and to "grant deference to counties and cities in how they plan for growth."[9] However, the County's actions are not boundless; their actions must be consistent with the goals and requirements of the GMA.[10]

Thus, the burden is on Petitioners to overcome the presumption of validity and demonstrate that the challenged action taken by the County is clearly erroneous in light of the goals and requirements of the GMA.

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[5] RCW 36.70A.290(1).
[6] RCW 36.70A.320(3).
[7] RCW 36.70A.320(3).
[8] *City of Arlington v. CPSGMHB,* 162 Wn.2d 768, 778, 193 P.3d 1077 (2008)(Citing to *Dept. of Ecology v. PUD District No. 1 of Jefferson County,* 121 Wn.2d 179, 201, 849 P.2d 646 1993); *See also*, *Swinomish Tribe v. WWGMHB,* 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); *Lewis County v. WWGMHB,* 157 Wn.2d 488, 497-98, 139 P.3d 1096 (2006).
[9] RCW 36.70A.3201 provides, in relevant part: "In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community."
[10] *King County v. CPSGMHB,* 142 Wn.2d 543, 561, 14 P.2d 133 (2000) (Local discretion is bounded by the goals and requirements of the GMA). See also, *Swinomish,* 161 Wn.2d at 423-24. In *Swinomish,* as to the degree of deference to be granted under the clearly erroneous standard, the Supreme Court has stated: "The amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the [jurisdiction's] actions a 'critical review' and is a "more intense standard of review" than the arbitrary and capricious standard." *Id.* at 435, n.8.

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III. BOARD JURISDICTION

The Board finds the Petition for Review was timely filed, pursuant to RCW 36.70A. 290(2). The Board finds the Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2)(b). The Board finds it has jurisdiction over the subject matter of the petition pursuant to RCW 36.70A.280(1).

IV. PRELIMINARY MATTERS

Subsequent to the filing of the Petitioner's and Respondent's briefs for the Hearing on the Merits, the Petitioner sent the Board a letter dated July 12, 2013, transmitting to the Board Douglas County's 60-day notice to the State of Washington Department of Commerce dated May 14, 2013, along with a letter of response from the State of Washington, Department of Agriculture dated July 1, 2013. On July 15, 2013, the County emailed the Board a Statement of Actions taken by the County, along with exhibits A through D, including a 60-day notice to the Department of Commerce dated May 14, 2013, an email response from the Department of Commerce dated June 21, 2013, a letter from the Department of Agriculture dated July 1, 2013, and a letter from the Cashmere Valley Bank dated January 15, 2013. On July 17, 2013, subsequent to the Hearing on the Merits, the County emailed the Board a letter concerning the letter sent by the Department of Agriculture. Pursuant to WAC 242-03-640(3), the Board takes official notice of the Petitioner's letter and attachments thereto dated July 12, 2013, and the County's Statement of Actions Taken dated July 15, 2013, along with its attachments. The Board considers the County notice to Commerce and the state agency responses to be material facts in this case. The Board does not take notice of the County's letter of July 17th, 2013, submitted after the Hearing on the Merits.

V. LEGAL ISSUES AND BOARD ANALYSIS

Petitioners declined to brief Issue 2 in their Prehearing Brief and also failed to present any legal arguments on Issue 2 at the Hearing on the Merits.[11] At the hearing, Petitioners stated they were abandoning Issue 2. Under WAC 242-03-590(1), failure by a party to brief

[11] Petitioners' Prehearing Brief at 2.

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an issue shall constitute abandonment of the unbriefed issue. Therefore, the Board finds that Issue 2 is abandoned by Petitioners, leaving only Issue 1 for consideration by the Board.

Issue 1 – Failure to notify the Department of Commerce

> Did Douglas County's adoption of Ordinance No. TLS 12-16-49, by failing to timely and sufficiently notify the Department of Commerce of its intent to adopt permanent development regulations, violate RCW 36.70A.106 and/or WAC 365-196-630?

Applicable Law

RCW 36.70A.106 requires that Development Regulations be transmitted to the Washington State Department of Commerce 60 days prior to final adoption so that state agencies are notified of changes and have an opportunity to provide any needed comments for consideration by the County:

> (1) Each county and city proposing adoption of a comprehensive plan or development regulations under this chapter shall notify the department of its intent to adopt such plan or regulations at least sixty days prior to final adoption. State agencies including the department may provide comments to the county or city on the proposed comprehensive plan, or proposed development regulations, during the public review process prior to adoption . . .
>
> (3)(a) Any amendments for permanent changes to a comprehensive plan or development regulation that are proposed by a county or city to its adopted plan or regulations shall be submitted to the department in the same manner as initial plans and development regulations under this section. . . .

WAC 365-196-630(1) also requires a 60-day notice to the Department of Commerce for proposed amendments to development regulations.

Positions of the Parties

In both the Petitioner's Motion for Summary Judgment received by the Board on April 22, 2013, and its Prehearing Brief, the Petitioners argue that the late filing of its notice to the Department of Commerce is so egregious that the Board should enter orders of non-

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compliance and invalidity for Douglas County Ordinance No. TLS 12-16-49.[12] In both documents, the Petitioner's argue on the one hand that the fact that the Ordinance has already been adopted may be sufficient reason for Commerce and/or other state agencies not to make any comments and, on the other hand, that even if comments are received, the fact that the Ordinance has already been adopted may give the County incentive to ignore any comments received.[13] The Petitioners argue further that the late filing of Notice to Commerce interferes with Goal 11 of the Growth Management Act, which covers citizen participation and coordination, in such a way that it interferes with the fulfillment of the goals of the Act. In their legal arguments presented at the Hearing on the Merits, the Petitioners argued that the comments received by the County on its Ordinance from two state agencies were not included in a Notice to the Public; and the decision by the County Commissioners to not change its new Ordinance based on state comments was not subject to a public hearing. In the Hearing, the Petitioners also argued that the letter from the Department of Agriculture indicates that the new Ordinance would make Douglas County farms ineligible for financing, thereby jeopardizing continued use of lands for farming.

Douglas County acknowledges that it did not notify the Department of Commerce as required by RCW 36.70A.106, but has subsequently filed the requisite notice, received agency comments, and the County Commissioners have decided not to change Ordinance No. TLS 12-16-49. In Douglas County's Response to Dispositive Motion dated April 25, 2013, it reports that the new Ordinance was passed to settle a previous Eastern Washington Growth Management Hearings Board Case No. 12-1-0003, and bring the County into compliance with the Growth Management Act.[14] The County believed its adoption of the new Ordinance was part of an ongoing process of amending the County's Development Regulations for the previous code changes which were in dispute, being analogous to court proceedings appealed to the Court of Appeals or Supreme Court.[15] In its

[12] Petitioner's Motion for Summary Judgment, received on April 22, 2013, at 1; and Petitioner's Prehearing Brief, at 2.
[13] Petitioner's Motion for Summary Judgment at 10, and Petitioner's Prehearing Brief at 11.
[14] Douglas County's Response to Dispositive Motion, dated April 25, 2013, at 2.
[15] *Id*.

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Statement of Action by Douglas County dated July 15, 2013, the County reports that it filed a Notice of Intent to Adopt Amendment to the Department of Commerce setting out the proposed amendments to the County's Development Regulations on May 14, 2013, and received responses from the Departments of Commerce and Agriculture on June 21 and July 8, respectively.[16] In the Hearing on the Merits, the County Prosecutor stated that on July 15, over 60 days from the date it filed the necessary notice to the Department of Commerce, the County Commissioners considered the comments received from the state agencies and decided not to revise Ordinance No. TLS 12-16-49.

The County alleges the following reasons why its new Ordinance is designed to comply with the goals and the requirement of the GMA in protecting prime farmlands:[17]

1. It clarifies that the created lots may not be further divided.
2. It provides notice to nearby property owners.
3. It limits ownership and occupancy of the created residential lot to relatives, former owners, or agricultural employees.
4. It precludes the lots created from being used to de-designate agricultural resource lands.
5. It limits the process to lands not suitable for agriculture.
6. It broadens the protection of nearby agricultural lands.

Both the Petitioners and the Respondents cited numerous previous Board cases regarding the required notice to the Department of Commerce but differ on the remedy that should be applied to this case. The Petitioners state that although the remedy in some of the relevant Board cases was the mere entry of an order on non-compliance, there is no evidence that the petitioner also requested an order of invalidity.[18] In its Prehearing Brief, Douglas County argues that the issue before the Board is whether non-compliance with RCW 36.70A.106 should result in issuance of an Order of Invalidity, and asserts that no previous Board decisions on this issue have resulted in an Order of Invalidity.[19] The County

[16] Statement of Actions Taken by Douglas County, dated July 15, 2013, at 1-2.
[17] Douglas County's Prehearing Brief at 12-13.
[18] Petitioner's Motion for Summary Judgment at 10
[19] Douglas County's Prehearing Brief at 6.

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points out that in two previous Board cases, the petitioners in those cases requested invalidity of the challenged actions but the Board held that the petitioners failed to meet the burden of proof for invalidity.[20] The County argues that RCW 36.70A.106 is intended to solicit comments from state agencies; it is not intended to promote citizen participation.

Board Discussion and Analysis

The case before the Board is whether the County complied with RCW 36.70A.106 and WAC 365-196-630, regarding a proper 60-day notice to the Department of Commerce for County Ordinance No. 12-16-49. The County acknowledged its error in its letter to the Board of April 1, 2013, in Douglas County's Response to Dispositive Motion,[21] and in its Prehearing Brief.[22]

Although the Petitioner now argues that the failure to file a 60-day notice with the Department of Commerce also violates Goal 11 of the GMA regarding Citizen Participation as noted in RCW 36.70A.020(11),[23] an alleged Goal 11 violation was not in the issue statement for Issue No. 1 in the Board's Prehearing Order, nor added to the issues presented to the Board in the time period presented by the Board in its Prehearing Order. The GMA states that the Board shall not issue advisory opinions on issues not presented to the Board in the statement of issues, as modified by any prehearing order.[24] Therefore, the Board cannot consider any new arguments asserting non-compliance with Goal 11.

Although Petitioner argues that a late filing to the Department of Commerce cannot be rectified, the Board disagrees and believes that a late filing of an amendment of the County's development regulations with the Department of Commerce reasonably corrects the violation of the GMA. The notice requirement to Commerce, with its coordination with other state agencies, is the focus of this requirement, not a part of a broader public involvement process. As noted in *McNaughton v. Snohomish County*:

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[20] *Id*., p.9.
[21] Douglas County's Response to Dispositive Motion, dated April 25, 2013, at 3.
[22] Douglas County's Prehearing Brief at 5.
[23] Petitioner's Prehearing Brief at 11.
[24] RCW 36.70A.290(1).

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> While the Legislature designed the GMA to operate on a "bottom up" basis, with local jurisdictions devising their own plans and procedures, the stature requires CTED (The Department of Commerce) to review local plans and proposed amendments, and empowers CTED to comment and advise jurisdictions. The Boards see only those local plans that are challenged, but CTED has a broad perspective arising out of its statutory responsibility. As the Eastern Board commented in *City of Spokane Valley, supra*, at 15: "The Legislature directed CTED to properly review the substance of all proposed amendments submitted by local government entities. The Board does not wish to undermine the statutorily mandated 60-day timeframes that CTED needs to carry out its duty under the GMA." *Therefore the Board has no authority to assume that CTED would not comment or to decide that the County's failure to provide the statutory notice is harmless error.* [25] (emphasis added).

The County did initially violate RCW 36.70A.106 and did not comply with WAC 365-196-630 but has subsequently taken the actions required by the GMA, by properly filing the 60-day notice, receiving and considering comments from two state agencies and considering the comments in its final decision. It would be a duplicative and futile act to remand this case to Douglas County so that the County could notify Commerce yet again. The GMA does not require duplicative notices to Commerce. Accordingly, the Board finds and concludes that Douglas County is now in compliance with the GMA as to the RCW 36.70A.106 notice requirement.

Invalidity

For Douglas County's failure to notify Commerce of the County's intent to adopt amended development regulations at least 60 days prior to final adoption, Petitioners request that the Board impose invalidity as to Ordinance No. TLS 12-16-49.[26]

Under RCW 36.70A.302(1), the Board may determine that part or all of a comprehensive plan or development regulations are invalid if the Board:

> (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;

[25] CPSGMHB Case No. 06-3-0027, FDO, at 27.
[26] Petitioner's Prehearing Brief at 2.

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> (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
> (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

Petitioners argue that the late filing is an egregious violation of the GMA, but the Board believes that the County has taken the proper action to comply with the Act. In addition, the purpose of the County's new amendment was to come into compliance with the Act which could be undone by a ruling of invalidity. The County reports that it mistakenly did not report the new amendment because it was part of a settlement agreement on a previous Growth Board case which was enacted to bring the County into compliance with the GMA.[27] The County further reports that issuance of an Order of Invalidity regarding Ordinance No. TLS 12-16-49 would result in its development regulations being noncompliant with the GMA and substantially interfere with the goals of the GMA.[28] In its Prehearing Brief, the County stated how the Ordinance would better protect farmland and comply with the GMA.[29] In its Statement of Actions by Douglas County, the County explains how it has received and considered the comments received from the Department of Agriculture.[30] Although the Petitioner presents a potential concern about farm financing and how the new Ordinance would affect the viability of farm lands, the Board notes that the basis for this assertion is only a letter from one bank that states that any new lots created by this Ordinance could not be eligible for financing at that bank.[31] The County points out that this potential financing problem only relates to new parcels, not the remaining farm parcels and does not affect the viability of designated farmlands.[32]

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[27] Douglas County's Prehearing Brief at 11.
[28] *Id.*
[29] *Id.* at 12.
[30] Statement of Actions by Douglas County at 3.
[31] Statement of Actions by Douglas County Exhibit D.
[32] Statement of Actions by Douglas County at 3.

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In previous Board cases, the remedy for late notification has also been to remand the ordinances for proper notification, without a determination of invalidity. In particular, in *McNaughton v. Snohomish County*, a case cited by both the Petitioners and the Respondents, invalidity based on the late notification to the Department of Commerce, was rejected as an option, even when the Petitioners in the case cited several goals of the GMA, including Goal 11 regarding public participation:[33]

> In the present matter, the only provision of the GMA which the Board finds to have been violated by Snohomish County is RCW 36.70A.106, the requirement to submit proposed comprehensive plan amendments to CTED for a 60-day review period prior to adoption.
>
> **However, the Board finds and concludes that the County's noncompliance with RCW 36.70A.106 does not substantially interfere with or thwart any of the goals of the Act cited by petitioner** (emphasis added).

As noted in *McNaughton v. Snohomish County*, both the Eastern and Western Growth Management Hearings Boards have remanded ordinances when the enacting jurisdiction failed to give the required notice to CTED. *Cameron Woodard Homeowners Ass'n v. Island County*, WWGMHB Case No. 02-2-0004, Order on Dispositive Motion (June 10, 2002) at 2 ("There is no room for interpretation of this statute as the language is direct and specific"); *City of Spokane Valley v. City of Liberty Lake*, EWGMHB Case No. 03-1-0007, Order on Compliance (March 18, 2005) at 15; *City of Liberty Lake v. City of Spokane Valley*, EWGMHB Case No. 03-1-0009, Order on Motions (March 23, 2004) at 3; *Bauder v. City of Richland*, EWGMHB Case No. 01-1-0005, Final Decision and Order (Aug. 16, 2002) at 6 ("This failure is not merely procedural. We do not have the authority to overlook a failure to comply with this notice. It is clear that if a board finds a failure to comply, it must remand the matter to the City to cure the noncompliance"). The Western Board's decision in *Ostrom, supra,* states: "The statutory requirement to notify the department of the intent to adopt at

[33] CPSGMHB Case No. 06-3-0027, FDO, at 26-27.

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least 60 days prior to final adoption applies *each time* any implementing regulation or amendment is proposed for adoption."

The Board believes the appropriate action has been taken by the County to comply with the notification requirements to the Department of Commerce, and the Board has found Douglas County to be in compliance with the GMA. The Board also finds and concludes that Petitioners failed to show that continued validity of part or parts of Douglas County's development regulations would substantially interfere with the fulfillment of the goals of the GMA. Accordingly, the Board declines to issue a determination of invalidity.

VI. ORDER

The Board now finds the County is in compliance with the GMA with regard to its required notice to the Department of Commerce concerning Ordinance No. TLS 12-16-49. The Petitioner's Motion for Summary Judgment dated April 22, 2013, is denied and the Board denies the Petitioner's request for a determination of invalidity. This case is closed.

SO ORDERED this 26th day of August, 2013.

_____
Charles Mosher, Board Member

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Raymond L. Paolella, Board Member

Cheryl Pflug, concurring in part and dissenting in part.

I concur with my colleagues in denying Petitioners' Motion for Summary Judgment and request for a determination of invalidity, but would find the County noncompliant and remand the action to the County for a Statement of Actions Taken to Comply indicating the County's findings in response to comments received from the Department of Agriculture.

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Invalidity

The County insists that adoption of the ordinance was necessary because it was the result of private negotiation between the County and petitioners which settled a prior case.[34] Douglas County contends that the challenged action was required under a previous Settlement Agreement, but it is well established that the Board does not enforce settlements or guarantee that they comply with the GMA. In *Fallgatter/Kirkman v. City of Sultan*, Petitioners challenged, inter alia, the City's failure to comply with terms of a Settlement Agreement that had resulted in dismissal of a prior challenge,[35] but the Board did not have jurisdiction to enforce a settlement agreement. The Board's warning[36] in *Brodeur v. Benton County* bears repeating:

> Entry of this order of dismissal is not to be interpreted as approval by the Board of the terms of any settlement agreement, nor any agreement to enforce the terms of such settlement agreement.

A settlement agreement does not guarantee that an action is compliant with GMA goals and requirements, and it certainly does not exempt a County from compliance with such. I would find that the County errs in arguing the prior settlement agreement bears on whether the Board should invalidate Ordinance No. TLS 12-16-49.

Nevertheless, I concur with my colleagues that the County's noncompliance here does not support invalidity. Multiple GMHB decisions support giving the County an opportunity to cure a failure to notify Commerce and it is reasonable that the Board do so here.

Noncompliance and Cure

However, I respectfully dissent from my colleagues' finding that the County is presently in compliance with the GMA with regard to the requirements of RCW 36.70A.106.

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[34] *Douglas County Coalition for Responsible Government, et al. v. Douglas County*, EWGMHB Case No. 12-1-0003 (January 9, 2013).
[35] *Fallgatter/Kirkman v. City of Sultan*, CPSGMHB Case No. 06-3-0003, Order Regarding Disqualification of Board (June 5, 2006) at 1-11.
[36] *Brodeur, et al. v. Benton County*, EWGMHB Case No. 10-1-0001c, Order of Dismissal (August 17, 2010) at 2.

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In a factually-similar case, *Your Snoqualmie Valley,* the Board remanded the Ordinance to the City to be submitted to the Department of Commerce for review and comment pursuant to RCW 36.70A.106.[37] There the Board ordered:

> Following the 60-day review period (or shorter time if expedited review is granted), the City shall file a Statement of Actions Taken to Comply, indicating the City's actions in response to agency comments, if any. … [I]f no comments are received, the Board will thereafter issue an order of compliance without further hearing.[38]

Implicit in the Order was the Board's recognition that something more would be required if comments were received. That "something more" would normally be reported in the Statement of Actions Taken to Comply. This should not be read to mean that a City or County must act on the Department's comments, but surely RCW 36.70A.106 must be read in the context of the entire GMA to have some purpose beyond soliciting comments. Surely the statute contemplates the Commissioners' consideration of the solicited department responses prior to legislative action. To read it otherwise would be to elevate form above substance and render the act of soliciting comments an exercise in futility. As the Board decided in *McNaughton*, the Board "has no authority to assume that [the department] would not comment or to decide that the County's failure … is harmless error."[39]

The issue of failure to notify the Department prior to legislative action has arisen on multiple occasions when, as here, there has been confusion on the part of the jurisdiction as to the need to notify Commerce of a substantive change in the proposal. The instant case is distinguished from *Your Snoqualmie Valley* and others[40] in that comments <u>were</u> received from an agency during the 60-day comment period, yet the Record before us contains no evidence that the County Commissioners considered the comments received from the Department of Agriculture. Obviously, the Commissioners could not have considered the

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[37] *Your Snoqualmie Valley, et al. v. City of Snoqualmie,* CPSGMHB Case No. 11-3-0012, FDO (May 8, 2012) at 33.
[38] *Id*.
[39] *McNaughton v. Snohomish Co.,* CPSGMHB Case No. 06-3-0027, FDO (January 29, 2007) at 27.
[40] See, e.g., *Cameron-Woodard Homeowners Assoc. v. Island County*, WWGMHB Case No. 02-2-0004 (September 17, 2002); *Bauder v. City of Richland,* EWGMHB Case No. 01-1-0005 (August 16, 2002); *McNaughton Group, LLC v. Snohomish County,* CPSGMHB Case No. 06-3-0027, FDO (January 9, 2007).

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agency's proposed amendments prior to enacting the challenged ordinance because they did not receive those comments until July 8, 2013[41] – well after the Commission adopted the Ordinance on December 18, 2012. The 60-day comment period expired on July 15, 2013. That same day, the Board received a Statement of Actions Taken to Comply from the Douglas County Prosecuting Attorney[42] reporting that the County had received comments from the Department of Agriculture, detailing the reasons the Prosecutor believed the Department of Agriculture misunderstood the facts, and concluding with the assertion that no further actions were necessary.[43] Missing are legislative findings to support that conclusion, or any other evidence that the Commissioners discussed the Department's comments.

The Board does not have the authority to dictate how the County should respond to agency comments. RCW 36.70A.3201 leaves that to the discretion of the County so that, if agencies were afforded opportunity for consideration of their comments prior to enactment, the legislative action must be presumed valid. Here, the County is not afforded that deference because the County concedes[44] that its process for adopting the Ordinance did not comply with GMA requirements in RCW 36.70A.106 and WAC 365-196-630[45] and because the Department's comments were not considered prior to the County's action. It is reasonable to ask for some evidence that the County has fully complied with RCW 36.70A.106 and WAC 365-196-630.

I would find that the County is noncompliant until it "considers" the comments timely received from the Department of Agriculture and require that the County provide a Statement of Actions Taken to Comply that includes, at a minimum, evidence of the Commissioners' consideration of the Department's concerns and suggestions.

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[41] Statement of Actions by Douglas County Exhibit D.
[42] *Id.*
[43] *Id.* at 2-3.
[44] Douglas County's Prehearing Brief at 5.
[45] "…Board deference to county decisions extends only as far as such decisions comply with GMA goals and requirements. In other words, there are bounds." *Lewis County v. Western Washington Growth Management Hearings Board,* 157 Wn.2d 488 at 506, fn. 16, 139 P.3d 1096 (2006).

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Mootness

In addition to receiving agency comments after notifying Commerce, this case is distinguished from other cases of failure to notify in that the County had time to notify Commerce and have a 60-day comment period prior to the Hearing on the Merits. It could be argued that the case is moot, although I would disagree for the reasons stated above in arguing noncompliance. Either way, our Supreme Court has recognized that an exception to the mootness rule is appropriate in a case involving "matters of continuing and substantial interest."[46] "After a hearing on the merits, it is a waste of judicial resources to dismiss an appeal on an issue of public importance which is likely to recur in the future."[47]

Given the number of cases in which a city or county has failed to notify Commerce of a proposal, or change to a proposal, I would find that this issue is likely to recur and reach a finding of noncompliance.

DATED this 26th day of August, 2013.

_____

Cheryl Pflug, Board Member (concurring in part and dissenting in part)

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[48]

[46] *Orwick v. Seattle*, 103 Wn.2d 249, 692 P. 2d 793, 253 (1984)(citing Sorenson v. Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)).
[47] *Orwick v. Seattle*, 103 Wn.2d 249, 692 P. 2d 793, 253 (1984).
[48] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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